STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

MEMORANDUM

TO: **Attorney General Wasden**

FROM: **Thorpe P. Orton**
Assistant Chief Deputy

DATE: **May 3, 2004**

RE: **Ethical Questions Concerning University Place Investigation**

This memorandum addresses attorney-client privilege, rule of confidentiality, and conflict of interest issues in the University Place investigation. These issues arise from the Office of the Attorney General's (OAG) role as legal advisor to several client-entities whose constituents[1] could become witnesses or targets,[2] and from the fact that information helpful to the investigation could be developed from interviews with deputy attorneys general who advised those client-entities.[3]

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[1] I use the word "constituents" instead of employees, agents, officers, etc. The word "constituents" is used in the Idaho Rules of Professional Conduct, specifically Rule 1.13, which deals with organizations as clients, to denote officers and employees of a corporate or governmental client.

[2] I do not intend to use the words "witnesses" or "target" in any technical, determinative sense. I understand that no conclusions have been reached about criminal conduct or charges. I simply intend to convey that, given the large circle of potential witnesses and targets, several client-entities played a role in overall transaction. Moreover, it is conceivable that other state officials who did not receive any legal advice or counseling from the OAG on this issue could be necessary to interview. I do not intend to suggest whether any of these clients or constituents thereof would have useful information or become prosecution witnesses or targets.

[3] I understand that criminal investigators would like to interview the deputy attorneys general who provided advice and counseling on this project. The purpose of such interviews would be to gain an overview and background of the entire transaction, which would be helpful in terms of tactics and strategy for future interviews with the individuals (public and private sector) who actually had decision-making and other responsibilities in the transaction. The deputy attorneys general are not suspected of any wrongdoing – interviews with them would simply provide investigators with a comprehensive overview that would make it easier to focus on discrete aspects of the overall transaction. I am also quite confident that the deputy attorneys general provided accurate and thorough legal advice to our clients in this matter.

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I. ORGANIZATION OF THIS MEMORANDUM.

This memorandum is divided into 6 sections. Section III is lengthy. It is primarily a cut-and-paste collection of noteworthy provisions from the Idaho Rules of Professional Conduct. I did not attempt to correct any grammatical or typographical errors, as they come directly from the Idaho State Bar Association's website, but I did format them to fit the style of this memorandum. You will also notice that block quotations are set apart by a different font, intended to make recognition of such easier.

II. BRIEF BACKGROUND.

The following facts are relevant to this research:

1. Deputy attorneys general provided advice and counseling to the Board and Department of Water Resources, Department of Administration, and the State Board of Education (SBOE), with respect to their role(s) in the University Place transaction. This advice and counseling was given in the normal course of duties.[4]

2. Shortly after the SBOE received the final management review of the University Place transaction by the SBOE, the OAG forwarded the Prince Report to the appropriate local prosecutors, the Ada County and Latah County Prosecuting Attorneys.

3. The Latah County Prosecuting Attorney is still reviewing the report for potential criminal charges.

4. The Ada County Prosecuting Attorney, on December 17, 2003, referred the matter to the Attorney General, claiming that he had a conflict of interest relating to Civic Partners and Ada County's long-standing dealings with that private entity. (**Exhibit "A"** attached.) It should be noted, however, that our tentative acceptance indicated that we were not aware of any conflicts we might have in the matter, but would let them know if this changed. (**Exhibit "B"** attached.) There has been no formal agreement entered between the OAG and Ada County, and there has been no court order entered appointing the Attorney General as the prosecutor in the University Place matter.

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[4] There were other state (or quasi-state) entities involved. The Superintendent of Public Instruction is a constitutional officer and member of the SBOE. She received legal representation from the Attorney General. The Board of Regents of the University of Idaho is the SBOE wearing a different hat. The Attorney General does not represent the University of Idaho and the State Building Authority.

III. LAWYER ETHICS RULES

The following provisions from Idaho's lawyer ethics rules -- the Idaho Rules of Professional Conduct (IRPC) – are noteworthy:

1. A sentence in the Preamble to the IRPC provides:

> A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

2. A section of the Scope to the IRPC provides:

> Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

3. Another section of the Scope to the IRPC provides:

> In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

4. Rule 1.2(d) of the IRPC, which deals with the scope of representation, provides:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- The Official Comment to IRPC 1.2(d) explains:

> Criminal, Fraudulent and Prohibited Transactions
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> A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
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> When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.
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> Where the client is fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.
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> Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience to the statute or regulation or of the interpretation placed upon it by governmental authorities.

5. Rule 1.6 of the IRPC, dealing with confidentiality of information, provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
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> (1) to prevent the client from committing a crime, including disclosure of the intention to commit a crime; or
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> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client.

- The Official Comment to Rule 1.6 of the IRPC explains:

> The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.
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> The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.
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> Almost without expectation, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.
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> A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.
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> The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer

confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm, may in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to

"counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning Lawyer's Conduct

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a

proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to the representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client

The duty of confidentiality continues after the client-lawyer relationship has terminated.

6. Rule 1.7 of the IRPC, setting forth the general rule on conflicts of interest, provides:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implication of the common representation and the advantages and risks involved.

- The Official Comment to Rule 1.7 of the IRPC explains:

Loyalty to a Client

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation in undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when

the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper is the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for a Lawyer's Service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's

professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest mat arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is a fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may arise the question when there is reason to

infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique for harassment. See Scope.

7. Rule 1.8(b) of the IRPC, which is a rule that provides a laundry list of prohibited business transactions, provides:

> A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

8. The Official Comment to Rule 1.13 of the IRPC, dealing with organizations as clients, has some helpful language concerning the unique status of the OAG and the its relationship to its client(s):

> The Entity as the Client
>
> An organizational client is a legal entity, but it cannot act through its officers, directors, employees, shareholders and other constituents.
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> Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.
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> When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer must not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.
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> When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of constituent that is in violation of law. In such a circumstance, it may be reasonably

necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

...

Government Agency

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole nay be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds

> adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, where there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.
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> Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.
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> ...

IV. THE LEGAL AUTHORIZATION AND DUTY OF THE ATTORNEY GENERAL TO ASSIST LOCAL PROSECUTORS.

My review of the potentially applicable ethics rules reveals two basic points upon which the axis of the question presented turns. First, the University Place investigation involves a situation where it is necessary or desirable to interview deputy attorneys general and constituents of client-entities, thereby raising rules relating to conflicts, confidentiality of client information and the attorney-client privilege. Second, government lawyers are often permitted, by virtue of constitutional and statutory provisions, to engage in legal representation that would normally be prohibited, and Idaho's lawyer ethics rules specifically recognize the primacy of such legal authority over the rules.

Thus, in order to fully analyze the question presented, it is necessary to set forth the Attorney General's constitutional and statutory powers relative to criminal prosecutorial jurisdiction.

Idaho Code § 67-1401(7) provides that it is a duty of the Attorney General, "[w]hen required by the public service, to repair to any county in the state and assist the prosecuting attorney thereof in the discharge of duties."[5]

Justice (and former Attorney General) Kidwell's specially concurring opinion in *State v. Summer*, 139 Idaho 219, 76 P.2d 963 (2003), lays out what I believe is an accurate outline of the Attorney General's legal power/duty over criminal prosecutions. Justice Kidwell's reasoning, set forth below, appears fully consistent with the reasoning of the full Court in the *Summer* decision and other decisions where similar issues have been addressed.

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[5] As you are aware from other research I have conducted, it is arguable (and, I think, legally correct) that the Attorney General's criminal prosecutorial assistance power is constitutional in nature, given that such power existed in Idaho's territorial laws and the Idaho Supreme Court's recognition that territorial laws are constitutional in nature unless specifically amended or deleted by constitutional provision.

1. "The Attorney General and county prosecutors are constitutional officers in Idaho." *Id.* at 224.

2. Two public policies are in play: First, the Attorney General must "resist the temptation to become overly involved with the role played by county prosecutors." *Id.* Second, there is a distinction between the roles for prosecuting attorneys and the Attorney General. *Id.*

3. Idaho statute and prior Supreme Court decision make it clear that county prosecutors have a duty to prosecute all felony crimes, unless he or she is disqualified. *Id.* at 224-225, citing I.C. §§ 31-2604(2), 31-2227; *Adamson v. Board of County Comm'rs of Custer County*, 27 Idaho 190, 191, 147 P. 785, 785 (1915).

4. A county prosecutor may petition the district court for appointment of a special assistant attorney general to assist in the prosecution of any criminal case pending in the county. Such an appointment is appropriate when good cause is shown. *Id.* at 225, citing I.C. § 31-2603.

5. The Attorney General "is not constitutionally or statutorily authorized to initiate criminal proceedings without an order of a district court." *Id.*

As discussed by Justice Kidwell, county prosecutors are endowed with primary responsibility over the penal laws of the State of Idaho. The following statutes set forth the nature of such powers and the relationship of the Attorney General with local authorities.

> 31-2603. SPECIAL PROSECUTOR -- APPOINTMENT. (a) When the prosecuting attorney for the county is absent from the court, or when he has acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged, and for which he is to be tried on a criminal charge, or when he is near of kin to the party to be tried on a criminal charge, or when he has a business connection or kinship with the complainant or defendant, or when he is unable to attend to his duties, the district court may, upon petition of the prosecuting attorney or board of county commissioners, by an order entered in its minutes, stating the cause therefor, appoint some suitable person to perform for the time being, or for the trial of such accused person, the duties of such prosecuting attorney, and the person so appointed has all the powers of the prosecuting attorney, while so acting as such.
>
> (b) The prosecuting attorney may petition the district judge of his county for the appointment of a special assistant attorney-general to assist in the prosecution of any criminal case pending in the county; and if it appears to the district judge to whom such petition is addressed that good cause appears for granting such petition, the district judge, may, with the approval of the attorney-general, appoint

an assistant attorney-general to assist in such prosecution. The compensation of the person so appointed shall be fixed by agreement between the district judge and the attorney-general and shall be paid by the attorney-general out of appropriations made available for the conduct of his office.

31-2604. DUTIES OF PROSECUTING ATTORNEY. It is the duty of the prosecuting attorney:

1. To prosecute or defend all actions, applications or motions, civil or criminal, in the district court of his county in which the people, or the state, or the county, are interested, or are a party; and when the place of trial is changed in any such action or proceeding to another county, he must prosecute or defend the same in such other county.

2. To prosecute all felony criminal actions, irrespective of whom the arresting officer is; to prosecute all misdemeanor or infraction actions for violation of all state laws or county ordinances when the arresting or charging officer is a state or county employee; to conduct preliminary criminal examinations which may be had before magistrates; to prosecute or defend all civil actions in which the county or state is interested; and when a written contract to do so exists between the prosecuting attorney and a city, to prosecute violations for state misdemeanors and infractions and violations of county or city ordinances committed within the municipal limits of that city when the arresting or charging officer is a city employee.

...

As important as what the law provides is what is does not provide in relation to the situation I am addressing in this memorandum. There is no law that provides that the Attorney General is to investigate potential crimes committed by state officials. The law simply does not give the Attorney General any status in this matter that is distinguishable in any way from other crimes (homicide, rape, etc.). Similarly, the Attorney General has not been asked by any state official (*e.g.*, the Governor or the Legislature) in the chain of command above the constituent members of our client-entities to conduct an investigation.[6] If, for example, the Attorney General had some unique and explicit legal responsibility or authorization from a client to investigate the conduct of state officials, then the analysis in the memorandum would be very different.

Finally, I have also examined the possibility that the common law might provide some independent basis upon which to conduct an investigation of this nature. Chapter 3 of the tome *State Attorneys General: Powers and Responsibilities*,

[6] The Governor has extremely broad powers to investigate the executive branch. Article IV, § 8 of the Idaho Constitution provides that the Governor "may require information in writing from the officers of the executive departments upon any subject relating to their duties...." He can require the information under oath and "appoint a committee to investigate." I recall Governor Batt using this authority to investigate the conduct of state officials in the Pribble matter (male prison guard having sexual relations with female inmates).

Lynne M. Ross, Ed., Nat'l Ass'n of Att'ys Gen., BNA Books (1990), discusses common law powers. Among those powers is one that caught my eye:

> **The Attorney General has the authority to prosecute criminal activity, in the absence of express legislative restriction.**
>
> In *State v. Jiminez*, the Utah Supreme Court ruled that applicable common law authorized the Attorney General to prosecute a crime of statewide, as opposed to purely local, proportions. The court noted that at common law, the government's top legal advisor was invested with criminal prosecutorial authority and that this principle had not been restricted expressly by state legislation.

Id. at 38 (footnote omitted; bold in original).

I read the *Jiminez* case and find it to be inconsistent with Idaho law and unreliable. First, the opinion is relatively short and does not contain the lengthy analysis and citations that I expected it would contain in order to reach the conclusion suggested above. Frankly, I think it is a result-driven opinion that rests upon more than what is revealed in the text. The 26-year-old decision has only been cited in 5 subsequent Utah decisions, and it has not been cited in any other jurisdictions.

Second, and more importantly, the ruling and underlying rationale appears inconsistent with Idaho law, as explained by the Idaho Supreme Court in *Newman v. Lance*, 129 Idaho 98, 922 P.2d 395 (1996) and the *Summer* case discussed *supra*.

The Utah Supreme Court's decision rests upon a statute that provides that the Attorney General has the duty to "prosecute or defend all causes to which the state ... is a party...." *Jiminez*, 588 P.2d 707, 709 (Utah 1978), citing and quoting U.C.A. , 1953, 67-5-1(1). Then, citing a case from Michigan and a case from Indiana, the court held that "[a]t common law the top legal advisor was invested with criminal prosecutorial authority, and such authority is deemed to be that of the Attorney General in the common law states of this country." *Id.*

With respect to the Utah statute, Idaho's analogous statute does not contain the word "prosecute." Idaho Code § 67-1401(1) provides that the Attorney General has the duty to "perform all legal services for the state and to represent the state ... in all courts...." Idaho's territorial laws did contain a similar provision with the word "prosecute," but they also contained an explicit acknowledgment of county prosecutors' power over prosecutions within their jurisdictions. Sections 250(1) and (7), 2052 of the Revised Statutes of the Idaho Territory of 1887. Based upon the Idaho Supreme Court's decisions in the *Williams v. State Legislature of* Idaho, 111 Idaho 156, 722 P.2d 465 (1986), and *Wright v.* Callahan, 61 Idaho 961, 99 P.2d 961 (1940), it is reasonable (and perhaps incumbent) to conclude that the county prosecutor's primary criminal jurisdiction is constitutional in

nature because it was memorialized in Section 2052 of the Revised Statutes of the Idaho Territory of 1887. Moreover, the Idaho Supreme Court has clearly held that the Attorney General has no right to initiate (or take over) criminal prosecution without permission of the local prosecutor and a court order. *Newman*, *supra*; *Summer*, *supra*.

V. DISCUSSION OF THE INTERPLAY BETWEEN THE ETHICAL RULES AND PROSECUTORIAL STATUTES

There is no question that in the context of the Attorney General's representation of his client-entities, *an attorney-client relationship exists*. In other words, in the context of the University Place transaction, the relationship between the Attorney General and the SBOE, Board and Department of Water Resources, Department of Administration, and Superintendent of Public Instruction was (and is) an attorney-client relationship.

The ethics ramifications of that relationship include the explicit acknowledgment in the Official Comment to Rule 1.6 of the IRPC: "The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance." (Emphasis added.)

Thus, it is clear to me that the representation provided to our client-entities in the University Place transaction is subject to the rule of confidentiality and attorney-client privilege. In addition, the reality is that the OAG has operated under the assumption that traditional attorney-client relationships exist with its client-entities (subject, of course, to laws like the Public Records Law, etc.).

For the sake of argument, I would acknowledge the likelihood that some communications between our lawyers and clients occurred in an open or public forum, or perhaps through documents that have been released by the client to third parties. Such circumstances might result in a court ruling that the communication was not privileged or confidential. Regardless, the rule of confidentiality is quite clear and quite broad, as explained in the Official Comment to Rule 1.6 of the IRPC:

> The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to **all information relating to the**

> **representation, whatever its source**. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

(Emphasis added.)

Rule 1.6 of the IRPC places an affirmative duty upon a lawyer to maintain confidentiality and assert the privilege.[7] The only exceptions relate to disclosures necessary to carry out the representation, prevent the client from committing a crime, and to establish a claim or defense for the lawyer. I do not believe, however, any of these exceptions have any applicability, at least at this juncture, to the University Place matter.

The ethical rules also provide that lawyers should not take representation that is adverse to a client. IRPC 1.7. "[A] lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated." *Id.*, Official Comment. If the conflict is apparent before representation, then representation should be declined. If it arises after representation, then withdrawal is appropriate. *Id.* The conflict can be waived by the client, but the Official Comment cautions:

> A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.

(Emphasis added.)

Rule 1.7 of the IRPC also recognizes that government lawyers often have duties that place them in situations far different than private lawyers. The Official Comment notes that "government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party." It could be argued that this language provides some degree of support for the OAG conducting a criminal investigation into University Place while representing the client-entities whose agents are potential witnesses or targets.

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[7] The Official Comment to Rule 1.6 of the IRPC explains that "[i]f a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable." (Emphasis added.)

However, the following sentence in the Official Comment cautions:

> The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

In the context of a matter as complex and far-reaching as University Place, taking into account the duration of our representation to the client-entities on the University Place matter, the sheer number of instances where our lawyers provided advice and counseling, the multiple client-entities and constituent members thereof involved, and given the fact that we work in the same buildings and often in very close physical proximity with our clients, I am inclined to advise that this cautionary sentence negates whatever value the preceding sentence offers to conducting an internal investigation and potential prosecution(s).

Finally, in addition to the rules discussed above, the fact that criminal investigators would like to talk to our lawyers who advised the client-entities raises the specter of Rule 1.8(b), which explicitly prohibits lawyers from using "information relating to representation of a client to the disadvantage of the client unless the client consents after consultation." While this sentence appears to apply to instances where an attorney is engaging in a business transaction, it nevertheless strikes at the heart of our fundamental problem – by virtue of information gained through legal representation, we have an advantage (or disadvantage, depending upon your perspective) in that we know things or have access to things that a normal investigator or prosecutor would not.

VI. RECOMMENDATIONS AND CONCLUSIONS

Undertaking a criminal investigation of the University Place matter presents a veritable minefield of ethical dilemmas for the Attorney General.

1. Interviewing deputy attorneys general about the University Place transaction would appear to be in violation of the ethical rules pertaining to the attorney-client privilege and rule of confidentiality. *See* IRPC Preamble, Scope, 1.6

2. Handling this investigation and potential prosecution(s) would appear to violate ethical rules pertaining to conflicts of interest. *See* IRPC 1.7, 1.8(b).

3. In many respects, I see our dilemmas in this matter as similar to and even stronger than the dilemmas faced by the Ada County Prosecuting Attorney in last year's Boise City scandals. You will recall in that case the local prosecutor conflicted out, citing his working relationship with the Mayor and political relationship. In this case, the Attorney

General certainly has similar concerns. Additionally, unlike the local prosecutor, who was not a city employee or officeholder, the Attorney General shares his state official status with potential witnesses and targets.

4. The Attorney General's relationship with potential state witnesses and targets also seems likely to become an issue. For example, if no charges are filed, there could be a perception that he is protecting his clients and political friends. If charges are filed, there could be a suggestion made by defendants of retaliation for perceived personal feuds or of over-charging to insulate against any outcries of cronyism. It seems like a no-win scenario.

5. The ethical dilemmas in items 1 and 2 above could be rectified by informed consent of the client(s) or compelled by appropriate court order.

- I am inclined to advise against the propriety of seeking consent from our clients. Certainly, they may be willing to give it. The ethical rules, however, contain a cautionary point that I believe is applicable to this matter. The Official Comment to Rule 1.6 of the IRPC provides in pertinent part:

> A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. (Emphasis added.)

  - Given the fact that the OAG provided representation on the University Place matter over the course of several years to numerous client-entities and constituent members thereof, given the integral part that representation played in our routine dealings with these clients, given the fact that these clients and constituents

are in many cases primary points of contact with established relationships with the Attorney General and his lawyers, and given the Attorney General's constitutional and statutory responsibility to provide all legal services to these clients, I am inclined to believe the first emphasized provision is applicable, thus making consent improper.

- Moreover, given that the Attorney General does not identify potential targets of criminal investigations, I am inclined to believe the second emphasized provision above may be applicable – we cannot tell them what they need to know in order to give informed consent.

- Finally, it should be noted that the Attorney General has a large role in the University Place matter that goes beyond issues of criminal law. A civil team of attorneys has been working hard on civil issues, primarily relating to the Attorney General's statutory responsibility to supervise nonprofit corporations (the University of Idaho Foundation). I.C. § 67-1401(5). These lawyers are also managing the state's legal position in any tort claims and over matters of risk management. These duties are uniquely within the Attorney General's domain. A parallel criminal investigation could interfere with these responsibilities.

It is my recommendation that the Attorney General decline to conduct a criminal investigation into this matter. Conflicts have arisen. The Ada County and Latah County Prosecuting Attorneys have a constitutional and statutory duty to conduct such an investigation and prosecution. If Ada County has a conflict of interest that supercedes its constitutional and statutory duty, then it can seek assistance from another local prosecutor.

EXHIBIT "A"

ADA COUNTY
PROSECUTING ATTORNEY

GREG H. BOWER

200 W. Front Street, Rm 3191
Boise, Idaho 83702

CRIMINAL
DIVISION
Phone (208) 287-7700
Fax (208) 287-7709

CIVIL
DIVISION
Phone (208) 287-7700
Fax (208) 287-7719

December 17, 2003

Lawrence G. Wasden
Idaho Attorney General
Statehouse, Room 210
Boise, Idaho 83720

In re: University Place Management Review

Dear Lawrence:

I am writing in regard to the University Place Management Review prepared by Holland and Hart, serving as Special Deputy Attorney General. The report notes that some of the actions discussed may have violated one or more state laws. My Office has made a preliminary examination of the report.

We have concluded that a conflict of interests may exist and that the appearance of impropriety dictates that we seek another to handle any possible criminal actions resulting from the conduct underlying this report. Our concern regarding a possible conflict is based, in part, on the existence of a long-term business relationship between Ada County and Civic Partners. Civic Partners plays a large and central role in the University Place controversy. Additionally, Ada County owns (or owned) one or more parcels of property discussed extensively in the report. As you are aware, my office represented Ada County in the sale of Parcel 1 (Unit 101) to the Idaho State Building Authority.

Accordingly, we ask that you serve in the role as conflict counsel in reviewing the report, and other relevant information, to determine if one or more crimes occurred in Ada County. In the event you determine such offenses did occur we will prepare a motion requesting appointment of your office as Special Prosecutor for the purposes of pursuing said criminal charges.

I would note that some of the parties named in the Holland and Hart report are located outside Ada County. I am not authorized by any other county to seek your

help in handling matters that may have occurred entirely outside Ada County. Those matters rest with the County Prosecutor for the relevant County.

Sincerely,

GREG H. BOWER
Ada County Prosecuting Attorney

EXHIBIT "B"

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

January 22, 2004

Greg Bower
Ada County Prosecuting Attorney
200 W. Front Street
Boise, ID 83702

Re: University Place Investigation/Prosecution

Dear Greg:

I am sending the standard agreement letter reflecting our assumption of the investigation and any possible prosecution in connection with University Place. We have not found any conflicts of interest that would prevent our taking on this responsibility, nor do we anticipate discovering any such conflicts in the course of the investigation or evaluation of this case. If we do discover such a conflict, we will let you know so that other arrangements can be made.

As we discussed in our conversation, it is possible that this case could involve extensive costs, such as additional forensic accounting expenses or payment for other experts. If it appears that any such extraordinary costs will be incurred, we will inform you in a timely fashion.

Thank you for consulting with us on this matter.

Sincerely,

MICHAEL A. HENDERSON
Deputy Attorney General
Chief, Criminal Law Division

MAH:m

Criminal Law Division
P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 334-2942
Located at 700 W. State Street
Joe R. Williams Building, 4th Floor

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

January 22, 2004

Greg Bower
Ada County Prosecuting Attorney
200 W. Front Street
Boise, ID 83702

Re: Special Prosecutorial Assistance Case/Conflict Case
University Place Investigation

Mr. Bower:

The agreement between Ada County and the Attorney General's Office is included herein. Once you have requested our assistance and we have been appointed special prosecutor, all final decisions with respect to investigation and prosecution shall be made by our office. Further, the actual costs of: obtaining, consulting with, and using experts, and obtaining, consulting with, and using other witnesses, the investigative costs and per diem for Attorney General staff, agents, witnesses and experts are to be covered by Ada County. These costs include travel, food and lodging for witnesses, experts and members of our staff who are involved in the case. Our office requests that these items be billed directly to the county. The county will not be charged for the hours or salaries of members of the Criminal Division who participate in this case. All payments made to this office shall go through Trudy Jackson, Business Manager, Office of Attorney General, P.O. Box 83720, Boise, Idaho 83720-0010. If your understanding, or the understanding of the commissioners, is different than that expressed in this letter, please let me know immediately. It is our pleasure to work side by side with you in this and any other case for which you request our assistance. If at any time you or the commissioners are dissatisfied with our office's involvement in this case, please do not hesitate to contact me immediately. The county warrants that funds are available or will be made available to pay for all charges incurred pursuant to this agreement. Our continued involvement in any case is by the mutual agreement of your local county officials and our office.

Criminal Law Division
P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 334-2942
Located at 700 W. State Street
Joe R. Williams Building, 4th Floor

It is our understanding that you are requesting assistance specifically to:

Investigate and/or prosecute any potential criminal activity relating to the specific case you forwarded to us.

Accepted by:

Sincerely,

GREG BOWER
Prosecuting Attorney
Ada County

MICHAEL A. HENDERSON
Deputy Attorney General
Chief, Criminal Law Division

MAH:rn

c: Trudy Jackson, Office of Attorney General

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

December 24, 2003

Greg H. Bower
Ada County Prosecuting Attorney
200 W. Front Street, Room 3191
Boise, ID 83702

Re: University Place Management Review

Dear Greg:

Your letter of December 17, 2003, addressed to Attorney General Wasden regarding the above referenced matter, has been referred to me for response.

As we discussed in our meeting on December 17, 2003, the Office of the Attorney General (OAG) has not, as of yet, formally accepted the referral from your office in this matter. Before acceptance of the referral, the OAG will first need to determine whether any conflicts of interest exist with regard to our investigation of this matter, and whether the OAG has the resources available to conduct such an investigation.

If the OAG formally accepts this referral, it would be with the normal understanding (pursuant to the customary practice, as memorialized in the Memorandum of Understanding Regarding Prosecutorial Assistance) that your office will be responsible for all out-of-pocket expenses. Those expenses could include, but would not be limited to, additional personnel required to be hired by the OAG for this investigation, costs for witnesses and expert witnesses (including forensic auditors and/or accountants), subpoenas and travel and lodging expenses.

I believe it would be beneficial for us to continue our discussions with regard to this matter to determine whether your office's potential conflict would run to all aspects of this investigation, or whether there are certain portions of the investigation that might be completed by your office. It would also be beneficial for us to have these same discussions with the Latah County Prosecutor's Office.

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 334-2530
Located at 700 W. Jefferson Street, Suite 210

If you have any questions about the above, please do not hesitate to contact me.

Sincerely,

SHERMAN F. FUREY III
Chief Deputy

SFF:jc